A

DATO' MOHAMAD YUSOF A BAKAR & ANOR v. DATUK BANDAR KUALA LUMPUR

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[JUDICIAL REVIEW NO: WA-25-139-05-2017]
B 13 SEPTEMBER 2017

ADMINISTRATIVE LAW: *Exercise of administrative powers – Judicial review – Leave to apply for judicial review – Absence of decision by Datuk Bandar Kuala Lumpur – Whether applicants allowed to seek for reliefs sought – Whether* C *application for leave pre mature – Rules of the High Court 1980, O. 53 r. 2(2)*

The applicants were the registered owners of two lots of land adjoining a proposed development. On 16 December 2016, the notice of the proposed development was advertised in a newspaper pursuant to r. 5(3) of the Planning (Development) Rules 1970 (as amended by Planning D (Development) (Amendment) Rules 1994) (the "Planning Rules"). The said notice also stated that registered owners of properties adjoining the proposed development within defined limits may send their objections against the proposed development to the Pengarah Jabatan Perancangan Bandar DBKL. The notice further stated that a meeting would be convened to hear E objections. *Vide* a notice dated 7 February 2017 issued pursuant to r. 5(4) of the Planning Rules, the applicants were notified of the meeting to be convened by the Jabatan Perancangan Bandaraya on 27 February 2017. The applicants had attended the meeting on 27 February 2017 and registered their objections against the proposed development. As at the date of the filing of F this application, the respondent had not made any decision of the application for planning permission pursuant to s. 22 of Federal Territory (Planning) Act 1982 ('the Act'). However, *vide* encl. (1), the applicants' applied for leave under O. 53 r. 3 of the Rules of Court 2012 ('the ROC') and sought, *inter alia*, (i) that the meeting held on 27 February 2017 be declared null and void; G (ii) that the Datuk Bandar Kuala Lumpur ('respondent') be prohibited from proceeding with any action arising from the meeting on 27 February 2017; and (iii) an order to stay any proceedings arising from the meeting on 27 February 2017. The issue that arose for determination was whether the applicants could commence judicial review even though the respondent had not made a decision.

H

Held (dismissing application for leave with no order as to costs):

(1) Under O. 53 r. 2(1), the applicant must apply for *certiorari, mandamus*, prohibition, *quo warranto* and under O. 53 r. 2(2), the applicant may include a prayer for a declaration, either jointly or in the alternative in I the same application if it relates to or is connected with the same subject

matter. However, in the present application, there was non-compliance with O. 53 r. 2(1) & (2) as the applicant was seeking a declaratory order as the main prayer instead of it being 'either jointly or in the alternative, if it relates to or is connected with the same subject matter,' as in the application for *certiorari, mandamus*, prohibition or *quo warranto*. Therefore, this application was irregular. (paras 15 & 16)

(2) This application was premature as the respondent had not made any decision under s. 22 of the Act, as to whether to grant or to refuse the planning permission in respect of the proposed development. As such, the applicants could not be said to be adversely affected as no decision had been made by the Datuk Bandar with regards to the planning application. The applicants could only be said to be adversely affected within the meaning of O. 53 r. 2(4) of the ROC if the respondent grants the application for the planning permission for the said development. (paras 30 & 31)

(3) What the applicants were seeking to review was not a decision, direction, acts or omission, but a meeting/inquiry held on 27 February 2017, which the respondent had to conduct pursuant to r. 5 of the Planning Rules. If the respondent had failed to call for the inquiry, such omission was subjected to judicial review as the law mandates that he calls for a meeting/inquiry. (para 35)

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA ***(refd)***

M & W Zander (M) Sdn Bhd v. Director General of Inland Revenue [2005] 6 CLJ 336 HC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Lembaga Rayuan Negeri Pulau Pinang & Anor [2005] 4 CLJ 885 CA ***(refd)***

Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Keselamatan Dalam Negeri & Anor [2008] 9 CLJ 503 HC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor [2003] 1 CLJ 210 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, Schedule para 1
Federal Territory (Planning) Act 1982, ss. 21, 22
Planning (Development) Rules 1970, r. 5(3), (4), (6)
Rules of Court 2012, O. 53 rr. 1(1), 2(1), (2), (4), 3(2), (5)
Rules of the High Court 1980, O. 53
Town and Country Planning Act 1976, s. 23(1)

For the applicants - David Samuel & R Thanasegar; Chambers of Firdaus
For the respondent - Raihana Maimunah Rushdi; FC

Reported by Sandra Gabriel

JUDGMENT

Azizah Nawawi J:

Application

[1] Enclosure (1) is the applicants' application for leave under O. 53 r. 3 of the Rules of Court 2012 (the "ROC 2012") seeking the following reliefs:

(i) a declaration that the meeting/inquiry to hear the objections of registered owners of properties adjoining the proposed development within defined limits conducted by the Datuk Bandar Kuala Lumpur (the "Datuk Bandar") on 27 February 2017 in respect of the proposal to build three blocks of apartments on Lot PT. 9885, Jalan 3/51B, Mukim Setapak, Kuala Lumpur is null and void;

(ii) an order of prohibition to prohibit the Datuk Bandar from taking any further proceedings in relation to the meeting/inquiry held on 27 February 2017 and/or making a decision with regards to the proposed development of the three blocks of apartments on Lot PT. 9885, Jalan 3/51B, Mukim Setapak, Kuala Lumpur; and

(iii) pursuant to O. 53 r. 3(5) of the ROC 2012, an order to stay all proceedings and/or any further steps taken by Datuk Bandar in relation to the meeting/inquiry held on 27 February 2017 and/or making a decision with regards to the proposed development of the three blocks of apartments on Lot PT. 9885, Jalan 3/51B, Mukim Setapak, Kuala Lumpur;

[2] The Attorney General of Malaysia has no objection to the application for leave.

[3] Having considered the application and the submission of the applicants, this court had dismissed the application for leave with no order as to costs.

The Salient Facts

[4] The applicants are the registered owners of Lot 16622 and Lot 16587 Taman Tiara Titiwangsa, Kuala Lumpur. The applicants claim to be registered owners of properties adjoining the proposed development of three blocks of apartments on Lot PT. 9885, Jalan 3/51B, Mukim Setapak, Kuala Lumpur.

[5] The respondent is the Datuk Bandar Kuala Lumpur who has the power to grant planning permission or to refuse to grant planning permission under s. 22 of Federal Territory (Planning) Act 1982 ("Act 267").

[6] On 16 December 2016, the notice of the proposed development on Lot PT. 9885, Jalan 3/51B, Mukim Setapak, Kuala Lumpur was advertised in a Chinese newspaper. The notice was issued pursuant to r. 5(3) of the Planning (Development) Rules 1970 (as amended by Planning (Development) (Amendment) Rules 1994) (the "Planning Rules"). The said notice also states that registered owners of properties adjoining the proposed development within defined limits may send their objections against the proposed development to the Pengarah Jabatan Perancangan Bandar DBKL. The notice further states that a meeting will be convened to hear the objections.

[7] *Vide* a notice dated 7 February 2017 issued pursuant to r. 5(4) of the Planning Rules, the applicants were notified of the meeting to be convened by the Jabatan Perancangan Bandaraya on 27 February 2017.

[8] The applicants had attended the meeting on 27 February 2017 and registered their objections against the proposed development on Lot PT. 9885, Jalan 3/51B, Mukim Setapak, Kuala Lumpur.

[9] As at the date of the filing of this application, the Datuk Bandar has not made any decision of the application for planning permission pursuant to s. 22 of Act 267.

[10] The applicants filed this application seeking a declaration that the meeting held on 27 February 2017 be declared null and void, that the Datuk Bandar be prohibited from proceeding with any action arising from the meeting on 27 February 2017; and an order to stay any proceedings arising from the meeting on 27 February 2017.

[11] The grounds of the application in the statement under O. 53 r. 3(2) of the ROC 2012 are:

(i) there was no full disclosure during the meeting on 27 February 2017 and a breach of the principle '*audi alterem partem*';

(ii) that the Datuk Bandar was biased, as the application for the proposed development was made by owner of Lot PT 9885, Yayasan Wilayah Persekutuan (the Federal Territory Foundation), of which the Datuk Bandar is one of the members of the board of trustees of the said Yayasan;

(iii) that the Datuk Bandar will act upon the instruction of the Minister of Federal Territories instead of exercising his discretion under Act 267; and

(iv) that the applicants have a legitimate expectation that the Datuk Bandar will act fairly with regards to the meeting on 27 February 2017.

The Findings Of The Court

[12] Order 53 rr. 1 and 2 of the ROC 2012, specifically provides the reliefs that can be applied in an application for judicial review. Order 53 r. 1(1) reads:

> This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

[13] The reliefs under para. 1 of the Schedule to the Courts of Judicature Act 1964 include, *inter alia*, orders in the nature of *certiorari*, *mandamus*, prohibition, *quo warranto*. The relief of *certiorari* is to quash decisions while *mandamus* is a relief against an 'omission' and is subject to Chapter VIII of the Specific Relief Act 1950. Prohibition is a relief to check unlawful actions in the exercise of a public function whilst a *quo warranto* is used to challenge the appointment of a person to a public office in the case where he is not qualified to hold that office or his appointment suffers from any legal flaw.

[14] Added to that, O. 53 r. 2(2) provides that an application for judicial review may include a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

[15] Therefore, under O. 53 r. 2(1), the applicant must apply for *certiorari*, *mandamus*, prohibition, *quo warranto* and under O. 53 r. 2(2), the applicant may include a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

[16] However, in the present application, there is noncompliance with O. 53 r. 2(1) & (2) as the applicant is seeking a declaratory order as the main prayer instead of it being 'either jointly or in the alternative, if it relates to or is connected with the same subject matter', as in the application for *certiorari, mandamus*, prohibition or *quo warranto*. Therefore, I am of the considered opinion that this application is irregular.

[17] In *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Keselamatan Dalam Negeri & Anor* [2008] 9 CLJ 503, similar objection was raised and the court agreed with the objection and granted the prayers for leave for a declaration as an alternative to the prayer for leave for an order of *certiorari*.

[18] On the merits of the application for leave, learned counsel for the applicants submitted that leave must be granted as the application is not frivolous or vexatious. It is common ground that the test for leave to commence with judicial review was held by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296, to be as follows:

> Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case of granting the reliefs sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though, ie, unless the matter for judicial review is amenable to judicial review no success may be envisaged.

[19] The main issue in this application is captured in para. 1.2 of the written submission of the applicants, that is "Can the applicants commence judicial review even though the respondent has not made a decision?". In this case, the main thrust of the applicants' judicial review is to nullify the meeting (not a decision) that was held on 27 February 2017.

[20] Order 53 r. 2(4) of the ROC 2012 reads as follows:

> Any person who is adversely affected by the decision, action or omission in relation to the exercise of a public duty or function shall be entitled to make the application.

[21] In the *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, the House of Lords held that the subject matter of every judicial review is a decision made by some person or (body of person) who is referred to as the decision maker or else a refusal by him to make a decision.

[22] In *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805, the Court of Appeal held that an application for a judicial review under O. 53 of the RHC is intended to impugn a decision, which is central to any judicial review. Thus, it is crucial to first identify definitely what the decision is that is sought to be impugned.

[23] In *M & W Zander (M) Sdn Bhd v. Director General of Inland Revenue* [2005] 6 CLJ 336, Justice Skinner said as follows:

> Reverting to the issue at hand, in my judgment it must follow that unless the applicant can show that the Director General has made a 'decision' within the meaning of that word in sub-rule (4) of O. 53 r. 2, the applicant does not pass the threshold test because the applicant cannot then be said to have an arguable case which needs further investigation on a full *inter partes* basis, nor does it have a sufficient interest since it is not 'adversely affected' by the decision of a public authority.

[24] In this case, there was a proposal to develop Lot 9885, Mukim Setapak, Kuala Lumpur. Under s. 21 of Act 267, an application for planning permission in respect of a development shall be made to the Datuk Bandar. Section 22 confers upon the Datuk Bandar the power whether to grant or refuse planning permission in respect of any development. Sections 21 and 22 read as follows:

> **21. Application for planning permission**
>
> (1) An application for planning permission in respect of a development shall be made to the Commissioner and shall be in such form and shall contain such particulars and be accompanied by such documents, plans and fees as may be prescribed …
>
> …
>
> **22. Development order**
>
> (1) The Commissioner shall have the power exercisable at his discretion to grant planning permission or to refuse to grant planning permission in respect of any development irrespective of whether or not such development is in conformity with the development plan; provided however the exercise of the discretion by the Commissioner under this subsection shall be subject to the provisions of subsection (4) and section 23.

[25] However, before the Datuk Bandar can make any decision under s. 22 of Act 267, he must comply with the procedures set out in the Planning Rules. The Planning Rules regulates the procedures for making applications for planning permission.

[26] Rule 5 of the Planning Rules regulates the right, entitlement conditions precedent to lodge an objection and to be heard on an application for a development order. Where the proposed development involved an increase in residential density or change of land use and that the Datuk Bandar considers a need for further inquiry, the Datuk Bandar may proceed to give notice of the proposed development by advertisement and invites objections from a defined category of "registered owners" adjoining the subject development within defined limits – separated by distance to lodge any objections to the proposed development. The said r. 5 reads:

> **5. Planning permission in respect of a development which involves increase in residential density or change of use of land.**
>
> (1) Upon receipt of an application for planning permission in respect of a development which involves increase in residential density or change of use of land, the Commissioner shall determine whether the proposed development:

(a) Is proper and may, subject to further inquiry, be considered; or

(b) Is inappropriate for the purpose of proper planning.

(2) If the Commissioner is of the opinion that the proposed development is inappropriate for the purpose of proper planning, he shall reject the application.

(3) If the Commissioner is of the opinion that the proposed development is proper and may, subject to further inquiry be considered, he shall, by way of advertisement in four local papers which shall be in the national language, English language, Chinese language and Tamil language, give notice of the proposed development and of the right to make objections by any person claiming to be:

(a) the registered owners of lands adjoining the land to which the application relates;

(b) the registered owners of lands separated by any road, lane, drain or reserved land the width of which does not exceed twenty metres and whose lands would be adjoining the lands to which the application relates had the lands not been separated by road, lane, drain or reserved land; and

(c) the registered owners of land located within the distance of two hundred metres from the boundary of the lands to which the application relates if, the access road to the lands to which the application relates is a *cul-de-sac* and the registered owners of land use the same *cul-de-sac*.

(4) The advertisement as required under paragraph (3) shall be advertised for three consecutive days and the space of the advertisement column shall not be less than 9 cm x 15 cm.

(5) Any registered owner specified in paragraph 3(a), (b) and (c) may, within fourteen days from the date of the advertisement, submit his objection, in writing to the Commissioner and when submitting his objection he shall indicate clearly his name, lot number and local postal address.

[27] Under r. 5(6) of the Planning Rules, the Datuk Bandar is to call for a meeting/inquiry, which he did *vide* a letter dated 7 February 2017. Rule 5(6) reads as follows:

(6) The Commissioner shall, after the expiry of the time specified in paragraph (5), fix a time and place to hear the registered land owners who have filed their objections in respect of the proposed development.

[28] The meeting/inquiry was held on 27 February 2017, and the applicants and other registered owners of Taman Tiara Titiwangsa had attended the said inquiry and raised their objections against the proposed development.

[29] Therefore, the Datuk Bandar has not made any decision whether to grant or to refuse the planning permission in respect of the proposed development of Lot 9885, Mukim Setapak, Kuala Lumpur. What the Datuk Bandar KL did was to conduct a meeting or an inquiry to hear objections from registered owners adjoining the proposed development within defined limits. This is a requirement of the law pursuant to r. 5(6) of the Planning Rules.

[30] I am therefore of the considered opinion that this application is pre mature as the Datuk Bandar KL has not made any decision under s. 22 of Act 267, as to whether to grant or to refuse the planning permission in respect of the proposed development. As such, the applicants cannot be said to be adversely affected as no decision has been made by the Datuk Bandar with regards to the planning application.

[31] The applicants can only be said to be adversely affected within the meaning of O. 53 r. 2(4) of the ROC 2012 if the Datuk Bandar grants the application for the planning permission for the development of Lot 9885, Mukim Setapak, Kuala Lumpur under s. 22 of Act 267.

[32] This can be seen from the case of *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248, where the applicant had filed an application to quash the development order issued by the Datuk Bandar under s. 22 of Act 267.

[33] In *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'far v. Datuk Bandar Kuala Lumpur & Anor* [2003] 1 CLJ 210; [2003] 5 MLJ 128, the application is to quash the decision of the Datuk Bandar who had approved the application for a planning permission.

[34] In *Majlis Perbandaran Pulau Pinang v. Lembaga Rayuan Negeri Pulau Pinang & Anor* [2005] 4 CLJ 885, the case involved a property developer who has made an application for planning permission. Before considering his application, the local planning authority had given directions to the said property developer. As he was not happy with the direction, the property developer appealed to the Appeal Board under s. 23 of the Town and Country Planning Act 1976. The Court of Appeal held that his grievances against the 'directions' is not appealable but may be the subject matter of judicial review. The court held that "decisions, directions, acts and omissions of the appellant falling outside the immediate scope of s. 23(1) of the Act may be the subject matter of judicial review in the ordinary way."

[35] In the present case, what the applicants are seeking to review is not a decision, direction, acts or omission, but a meeting/inquiry held on 27 February 2017, which the Datuk Bandar had to conduct pursuant to r. 5 of the Planning Rules. If the Datuk Bandar has failed to call for the inquiry, such omission is be subject to judicial review as the law mandates that he calls for a meeting/inquiry.

[36] Premised on the reasons enumerated above, I am of the considered opinion that this application is pre-mature as the Datuk Bandar has yet to make a decision under s. 22 of Act 267, whether to grant or refuse to grant the planning permission. The application for leave is dismissed with no order as to costs.